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SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 626

LOUIS FIANO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

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Petitioner presents his petition for a rehearing of this Court's order dated February 23, 1960, denying the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit, and, in support thereof, respectfully shows:

Grounds for Rehearing

Subsequent to the filing of the petition herein, this Court decided *Stirone v. United States.*[1] Petitioner submits that this decision constitutes an intervening circumstance of controlling effect such that a petition for rehearing should be granted.

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[1] *Nicholas A. Stirone, Petitioner* v. *United States*, No. 35, October Term, 1959, decided January 11, 1960.

The indictment herein charged in part that the narcotic drug

> "had been imported into the United States of America contrary to United States Code, Title 21, Section 174".[2]

The trial judge charged the jury with regard to the above clause as follows:

> "The narcotic drug must have been imported into the United States contrary to law. . . ." (R p. 312)[3]

To permit a trial judge to thus broaden the grand jury's charge was specifically disapproved by this Court in the *Stirone* case.[4] Mr. Justice Black stated,

> "Ever since Ex parte Bain, 121 U. S. 1, was decided in 1887 it has been the rule that after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself . . . . Although the trial court did not permit a formal amendment of the indictment, the effect of what it did was the same."

The Court proceeds to explain at length that such a variance unequivocally constitutes a substantial deprivation of a defendant's rights and cannot be disregarded.

We do not know what, if any, evidence was presented to the grand jury regarding unlawful im-

[2] The indictment is set forth at length as Appendix E to the petition.

[3] Reference to the Transcript of Record is designated "R".

[4] That the citation of the section by number in the indictment does not constitute a charge that the narcotics were unlawfully imported has been demonstrated at length in the petition and reply brief.

portation. Perhaps lack of any such evidence, or insufficient evidence, accounts for the failure of the grand jury to charge unlawful importation.

It must be pointed out that the presumption contained in the statute concerns only proof at the trial and not the requirements of the indictment. Any suggestion that the grand jury need not concern itself with evidence of unlawful importation alone presents an issue of such importance that it should be decided by this Court.

The opinion in the Stirone case concludes by specifically disapproving a trial court's supplying charges not made by the grand jury for reasons known only to itself.

Conclusion

The *Stirone* case constitutes a recent specific rejection by this Court of the technique applied in the case at bar. Considering also the petition and reply brief previously filed herein, this case presents important issues which should be decided by this Court. For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that, upon further consideration, writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit.

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March 7, 1960

Certificate of Counsel

I, L. DONALD JAFFIN, counsel for the above-named petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, subdivision 2, of the Rules of this Court.

L. DONALD JAFFIN
Counsel for Petitioner